Opinion of the Court of Appeals for the Tenth Circuit

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

No. 73-1560

JUNIOR CHAMBER OF COMMERCE OF ROCHESTER, INC., Rochester, New York, et al., Plaintiffs-Appellants, v. THE UNITED STATES JAYCEES, Tulsa, Oklahoma, et al., Defendants-Appellees.	Appeal from the United States District Court for the Northern District of Oklahoma (D.C. No. 73-C-66)

Judith R. Cohn of Wolf, Block, Schorr and Solis-Cohen, 12th Floor, Packard Building, Philadelphia, Pennsylvania (E. Gerald Riesenbach of Wolf, Block, Schorr and Solis-Cohen, on the brief), for Appellants Junior Chamber of Commerce of Philadelphia, Pennsylvania, Thomas S. Rittenhouse, Beverly Lynn Benson, Margaret M. Hipple and Roberta M. Schneider; Emmelyn Logan-Baldwin, 19 Arnold Park, Rochester, New York for Appellants Junior Chamber of Commerce of Rochester, Inc., Janis Gaines, Jane Selman, Charles Wetmore, James T. Bruen, David Heiligman, Thomas Banaszewski and Sydnee Schwartz; Debra A. Millenson, 1800 G Street, N.W., Washington, D.C., for Appellant Joann Clevenger; Josephine L. Citrin, 15 Cobbert Road, Portland, Maine, for Appellant Joan H. Clyne; S. Chandler Visher and James Hautzinger of Dawson, Nagel, Sherman & Howard, 1900 First National Bank Building, Denver, Colorado, local counsel to all Appellants.

Robert J. Corber, 1250 Connecticut Avenue, N.W., Washington, D.C. (Gary Taylor, 2301 First National Bank Building, Denver, Colorado, and Ronald S. Cooper and Kenneth I. Jonson II, 1250 Connecticut Avenue, N.W., Washington, D.C., Of Counsel, on the brief), for the private Appellees.

Ann Belanger, Attorney, Tax Division, Department of Justice, Washington, D. C. (Scott P. Crampton, Assistant Attorney General, Meyer Rothwacks and Jonathan S. Cohen, Attorneys, Tax Division, Department of Justice, Washington, D.C. and Nathan G. Graham, United States Attorney, Of Counsel, on the brief), for the federal Appellees.

Before BREITENSTEIN, McWILLIAMS and DOYLE, Circuit Judges.

DOYLE, Circuit Judge.

This is a sex discrimination case. Appellants seek review of a judgment of dismissal of the United States District Court for the Northern District of Oklahoma. The claim of the appellants in the District Court was that the United States Jaycees unconstitutionally excluded the Junior Chamber of Commerce of Rochester, New York and the individual appellants from affiliation and membership in the United States Jaycees. Similar claims are asserted by the Junior Chamber of Commerce of Philadelphia and of New Orleans, Louisiana, and individual members of those organizations. Appellants also asserted in District Court that certain named federal officers impermissibly support the United States Jaycees and various state and local Jaycee chapters by allowing them tax exemptions and by utilizing them to implement federal grants and programs.

The controversy was the result of the United States Jaycees' bylaws limiting membership to males. On this account the Junior

Chamber of Commerce of Rochester was expelled from the United States Jaycees because it had chosen to admit women as members. Individual members of the Rochester Jaycees were then prevented from becoming affiliated with the United States Jaycees and thereby lost certain opportunities to take part in the charitable work of the United States Jaycees, part of which involved the transmission of federal funds to the needy. Appellants allege that the United States Jaycees are violating the Fifth and Fourteenth Amendments to the United States Constitution and the Civil Rights Act, 42 U.S.C. § 1983, by prohibiting women from becoming members of the United States Jaycees and any state or local Jaycees organization.[1]

Various federal statutes, including the Civil Rights Act of 1964 as amended by the Equal Employment Opportunity Act of 1972, are relied on to gain admittance to federal court for the purpose of asserting the alleged violation. According to the allegations of the amended complaint, the Jaycees and various state chapters thereof received substantial tax benefits under §§ 501(c)(3) and (c)(4) of the Internal Revenue Act and also various federal grants and contracts from OEO and other departments of the United States Government. It is alleged that the various Jaycee organizations use federal funds to sponsor HEW programs, including construction of housing projects and assistance to underprivileged children.

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1. Why the defendant Jaycees would so adamantly oppose members of the feminine sex in its organization is most difficult to understand. It may well be that they fear the competition. They may indeed be concerned as to the known propensity of members of the feminine sex to devote themselves to causes such as this. We are not, however, permitted to pursue this inquiry--our mission being to ascertain whether the action complained of is sufficiently governmental to justify the federal courts' entertaining and taking cognizance of the claims.

From all of this, it is the position of plaintiffs that the United States Jaycees is in practical effect an arm of the government and that therefore when it discriminates in its membership policies it is acting officially. On this basis appellants claim that their rights are subject to the protection of the Fifth and the Fourteenth Amendments to the Constitution of the United States and are violated by the Jaycees' exclusionary membership policies.

The plaintiffs do not contend that they have any direct pecuniary interest in the funds which have been mentioned. An evidentiary hearing held by the District Court revealed that the United States Jaycees administer substantial grants on behalf of the government. A memorandum admitted into evidence showed that government funds distributed by the United States Jaycees amounted to approximately $985,000. However, the rights which the plaintiffs say were invaded were not monetary. Rather, they contend that they were deprived of leadership training and administrative experience.

The District Court ruled that the complaint failed to state a claim because the federal question was insubstantial. The court there noted that the plaintiffs had failed to allege any direct relationship between the discrimination against the plaintiffs and the distribution of government funds.

In support of their contentions that the discrimination is of constitutional dimension, the plaintiffs cite cases recognizing the invalidity of discrimination both in educational areas and in employment. See Frontiero v. Richardson, ____U.S.____, 93 S.Ct. 1764 (1973). In Frontiero there was a federal statute which differentiated between housing and medical benefits available to married male and female members of the armed forces.

The Supreme Court condemned this as unconstitutional, citing Reed v. Reed, 404 U.S. 71 (1971). Four members of the court held that classifications based upon sex were to be considered suspect. This shifted the burden to the government to establish the validity of such classifications and gave rise to the necessity for strict judicial scrutiny. In Reed the Supreme Court had ruled that an Idaho statute giving preference to males over females as administrators of estates was an unconstitutional violation of the equal protection clause.

There is no dispute about the invalidity of discrimination by the state or federal government based on sex and there is no dispute about the fact that the plaintiffs were excluded from membership in the organization purely on the basis of sex. Therefore, the only issue is whether the discrimination can by reason of the circumstances present, be considered official (state or federal) action. It must also be conceded that private discrimination does not give rise to a constitutional violation. See Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972).

The Supreme Court had held that entities which are ordinarily private but which perform governmental services cannot discriminate in carrying out their functions. Such agencies are subject to constitutional prohibitions. See, for example, Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961).

I.

We proceed to consider whether the plaintiffs have established a case under the Constitution and laws of the United States including 28 U.S.C. § 1331, which implements the "arising under" clause of Article III of the Constitution and authorizes suits arising under the Constitution and laws of the United States in which the amount in controversy exceeds $10,000.

The District Court did not dismiss the cause for lack of jurisdiction. It correctly entertained the action and then dismissed it because of plaintiffs' failure to show a substantial federal question.

In Bell v. Hood, 327 U.S. 678 (1946), a suit against agents of the FBI seeking damages for violations of the Fourth and Fifth Amendments, it was alleged that there were unconstitutional arrests, searches and seizures. The district court and the court of appeals dismissed for want of jurisdiction. However, the Supreme Court reversed these holdings, stating that the court must assume jurisdiction in order to decide whether the allegation stated a cause of action on which the court could grant relief as well as to determine the issues of fact arising in the controversy. According to the Supreme Court, jurisdiction is not defeated by the possibility that the complaint does not state a claim for relief. This is a question of law which must be decided by the court after the parties have advanced beyond the threshold of the court. The Supreme Court concluded in Bell v. Hood that a federal court has jurisdiction to entertain an action under 28 U.S.C. § 1331 if the complaint asserts a reasonable claim seeking recovery directly under the Constitution or laws of the United States. Under the two exceptions to this rule, a suit may be dismissed for lack of jurisdiction only where the alleged claim under the Constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous. 327 U.S. at 682.

Subsequently, in Bivens v. Six Unknown Named Agents of Fed. Bur. of Narc., 403 U.S. 388 (1971), the Court went much further in delineating the scope of federal court jurisdiction arising under the Constitution and laws of the United States.

The Bivens Court proceeded to carve out a damage remedy in federal civil rights actions based on violation of the Fourth Amendment. This approach is in accord with Gully v. First Nat. Bank in Meridian, 299 U.S. 109 (1936) and Smith v. Kansas City Title & Trust Co., 255 U.S. 180 at 199-200 (1921).

The Wright edition of Barron and Holtzoff, Vol. 1 at pp. 122-23, points out that whether there is a claim presenting a federal question and whether that claim is well founded when considered on its merits are two separate and distinct questions. The author goes on to say:

> However, the [federal] question must be substantial and not frivolous or a mere matter of form. A claim is not substantial if it is obviously without merit, or foreclosed by prior authoritative decisions. A proposition settled by the Supreme Court no longer presents a federal question for jurisdictional purposes. At the same time, a claim properly based on federal law raises a federal question even though all parties may agree as to the legal principles involved and disagree only as to the facts of the particular case.

It is difficult to apply jurisdictional principles to the instant case, which is somewhat of a borderline situation in which the facts are of minimal assistance. In the final analysis the plaintiffs demand an enormous amount, that is, injunctive relief against high officials of the United States, which relief would interfere with the administration of the tax laws affecting the allowance of tax exemptions. Plaintiffs make these extreme demands even though the tax benefits extended are not directly related to the discrimination complained of. Thus it comes close to a situation in which there is at least some temptation to ground the decision on lack of jurisdiction.

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Since, however, it is more a matter of form and procedure to dism the cause out of hand, we choose to accept jurisdiction and then to consider whether plaintiffs present a meritorious claim under the Constitution and laws of the United States.

The dichotomy between the jurisdictional question and the question of considering the claim on the merits is far from clear in the instant case. However, in view of the fact that the plaintiffs offered evidence to show that the various statutes were applied in an unconstitutional way, it appears to us that the cause is not one in which there is a palpable deficiency in the area of jurisdiction. Accordingly, we determine whether there is a sufficient federal claim upon which relief can be granted.

II.

The first question is whether there is a violation of 42 U.S.C. § 1983 which gives a remedy to persons whose civil rights have been invaded by officers acting under color of state law. Although plaintiffs have invoked this provision, they have not emphasized the official state action approach. Rather, the thrust of their argument is that there has been a violation of their constitutional rights because of the close relationship of the Jaycees with the United States Government. Indeed, they have not set forth either in their amended complaint or in their briefs a clear-cut theory in support of their alleged § 1983 claim. From a search of the record it would appear that the § 1983 claim is predicated on the fact that in some instances, and particularly in connection with the Rochester Jaycees, federal funds have been awarded by the United States to state agencies, which in turn have made grants to the local Jaycees chapter for use in activities sponsored by the Jaycees, such as drug abuse and minority betterment programs.

We fail to see that there is present the essential state action. It is one thing to say that the private organization has state character where it induces, encourages or promotes private persons to accomplish what it is constitutionally forbidden to accomplish. Norwood v. Harrison, 413 U.S. 455 (1973). We do not have such encouragement or promotion here. The Constitution applies if the private action complained of is in essence the action of the government. Burton v. Wilmington Parking Authority, supra. The plaintiffs would have us rule that because the Jaycees are used by the state government to dispense funds on its behalf that all their conduct automatically becomes state action subject to a § 1983 suit regardless of whether there exists discrimination by the private entity in the dispensing of the funds. In effect, then, plaintiffs say that the state must, consistent with the Constitution, refrain from dealing with discriminators regardless of whether the discrimination is related to the alleged state action. We disagree.

Our court has adopted a more restricted view of what is state action on at least two occasions. In Ward v. St. Anthony's Hospital, 476 F.2d 671 (10th Cir. 1973), it ruled that a hospital which had received some governmental funding as a small percentage (5%) of its total construction funds was not subject to civil rights actions against its hospital board even though the operation of the hospital was extensively regulated by the state. It was stressed that the acts complained of did not thereby serve to clothe the hospital with sufficient state authority so as to constitute state action. The opinion by Judge Hill also emphasized that the facts failed to establish that the State of Colorado had any part in the alleged deprivation. It was said that the regulation by the state existed only in order to assure quality medical services. Thus, none of the evidentiary matters there presented deprived the hospital of its private status or involved the state in the

alleged violations of the Federal Constitution. Cf. the Civil Rights Cases, 109 U.S. 3 (1883).

Browns v. Mitchell, 409 F.2d 593 (10th Cir. 1969) also held that unrelated and collateral discriminatory policies of private organizations do not furnish the state action necessary to a civil rights suit. The plaintiffs in Browns sought to establish that the University of Denver, a private institution, had state character and was subject to the Constitution and laws of the United States because of a substantial state tax exemption which extended to property operated for profit. In rejecting this, the lack of connection between the tax exemption and the conduct complained of was emphasized.

The membership policy against which the attack has been leveled has no connection with the state activity of the United States Jaycees. Neither the complaint nor the record establishes or promises to establish the kind of state involvement essential to a civil rights action under § 1983.

III.

There are very few cases involving federal action as distinguished from state action, but similar distinctions between acts of the government subject to constitutional limitati and private actions to which the Constitution does not apply obtain. Thus, the state action cases in which the Supreme Court has enunciated the applicable legal criteria must be considered, and generally the rule which has been adopted as to the state action (that the state itself must have some connection with the discrimination) would apply.

In Burton v. Wilmington Parking Authority, supra, the Supreme Court condemned discrimination by a restaurant-lessee of a Delaware parking garage or authority, saying that its refusal to serve a black patron constituted state action. Similarly, in Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972), a black patron, who was a guest of a member of the Moose Lodge, was refused service at the club's dining room and bar solely because of his race. The lower court found that the lodge's membership and guest practices were discriminatory and constituted state action. It declared the state liquor license invalid as long as the club's practices were continued. The Supreme Court adopted a narrower view, holding first that the plaintiff-appellee lacked standing to challenge the membership practices of the Moose Lodge, although he did have standing to litigate the validity of the refusal of the lodge to serve him. The Supreme Court then held that Pennsylvania's regulation of liquor traffic was not sufficient to implicate Pennsylvania in the discriminatory guest practices which were employed by the Moose Lodge. The Court further determined that there was no evidence in the record that the regulation of the sale of liquor was intended "overtly or covertly to encourage discrimination." We have concluded from this decision that there must be a sufficient nexus between the discrimination and the alleged state action in order to render the activity a constitutional violation.

An even more persuasive analogy is found in Walz v. Tax Commission of City of New York, 397 U.S. 664 (1970). Here a real estate owner sought to enjoin the Tax Commission from granting exemptions to religious organizations for properties used solely for religious worship. The Supreme Court held that the New York state statute exempting from real property tax an association organized exclusively for religious purposes was not unconstitutional in that it did not itself attempt to establish,

sponsor or support religion. The Supreme Court said that the religious clause of the First Amendment does not require absol abstention by the state from extending any aid to religious organizations. The state may therefore determine that entitie which foster moral or mental improvement are not to be inhibit in their activities by ad valorem taxes or the hazard of loss of their properties for non-payment. By so doing, the Court reasoned, the government is not thereby sponsoring religion. It is a less direct subsidy than a cash support. Therefore, the Supreme Court reasoned, when the government grants an exemption which does not actually involve the state with the activities of the beneficiary, "there is no genuine nexus between tax exemptions and establishment of religion."

In the case at bar the exemption granted to the United States Jaycees would be even less subject to constitutional attack than would an exemption granted to a church, for in the latter case (the Walz case) the proscriptions of the First Amendment expressly require the separation of church and state

We do not say that the relationship between the United States and the United States Jaycees is so remote that the actions of the Jaycees could never be attributed to the government. If, for example, the Jaycees administered the government's funds in a discriminatory manner, a remedy for constitutional violation might well obtain. In our case, however, the question is whether the United States is obligate to see to it that the United States Jaycees' conduct shall be exemplary quite apart from its administering of programs and governmental funds. No case has been cited which extends to this length. On the contrary, the criteria announced by the Supreme Court have tended to require that the alleged unconstitutional conduct relate specifically to governmental action.

IV.

This cause presents other problems which are argued in the briefs and to which we will briefly allude. Plaintiffs are seeking injunctions against high government officials first to prevent the making of grants for the use of the deprived and needy and, second, to void the tax exempt status of the United States Jaycees for collateral reasons not set forth in the statutes creating the grants or exemptions. These demands create practical as well as legal problems. Thus, the court is reluctant to interfere with the processes of government and, in effect, to write a tax statute which declares that government officials are obligated to withhold benefits to organizations which are general sinners regardless of whether the sins are committed in the disposition of the government's funds.

One legal obstruction is the doctrine of Dugan v. Rank, 372 U.S. 609 (1963); Larson v. Domestic and Foreign Corp.; 337 U.S. 682 (1949), and Land v. Dollar, 330 U.S. 731 (1947), which say that when government officials are acting in accordance with the dictates and mandates of the law they are not subject to suit, that is, the suit is, in effect, against the government and the doctrine of sovereign immunity comes into play. Such suits also conflict with the prohibition against interfering with the taxing process. See the Anti-Injunction Act, 26 U.S.C. § 7421; Enochs v. Williams Packing Co., 370 U.S. 1 (1962); State Railroad Tax Cases, 92 U.S. 575 (1875). See also 28 U.S.C. § 2201, Declaratory Judgment Act.

The Larson Court recognized two exceptions to the sovereign immunity doctrine which it had applied. First, the case in which the officer is acting beyond the law and, secondly, the situation in which he is acting unconstitutionally. The Court

said in Larson that neither exception applied and that the granting of relief would be tantamount to an unconsented judgment against the government.

The decision of the Supreme Court in Land v. Dollar, 330 U.S. 731 (1947), an action against members of the Maritime Commission to recover shares of stock delivered to the Commission as a pledge to secure a loan to the plaintiff's corporation, followed the basic doctrine later enunciated in Larson. In Land v. Dollar, supra, the Supreme Court recognized the right of the district court to entertain the suit because potentially at least it involved invalid retention of private property.

Dugan v. Rank, 372 U.S. 609 (1963) sought an injunction against reclamation officers to prevent impounding water behind a dam. Here the Court said that neither of the exceptions noted in Larson were present.

In our case there is neither an unconstitutional act on the part of the officers involved nor an action beyond the scope of the authority granted. Accordingly, no basis is shown for departing from the Larson doctrine.[2]

Finally, then, plaintiffs make tremendous and disproportionate demands which are beyond the realm in which the court can grant relief.

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2. Furthermore, we regard the District Court as having correctly decided that plaintiffs' constitutional challenge to several federal statutes is too insubstantial to require convocation of a three-judge district court under 28 U.S.C. § 2282.

For the reasons stated, the action of the District Court dismissing the cause was correct and the same is hereby approved. The judgment of the District Court is affirmed.

United States Court of Appeals
TENTH CIRCUIT
OFFICE OF THE CLERK
DENVER, COLORADO 80202

HOWARD K. PHILLIPS
CLERK

TELEPH
303-837-

April 29, 1974

TO: ALL COUNSEL

RE: NO. 73-1560, Junior Chamber of Commerce, etc., et al. v. United States Jaycees, et al.

Dear Counsel:

By letter dated April 12, 1974, this office forwarded the opinion in the captioned case.

This was a typographical error in stating that the Judgment in accordance with the opinion was entered as of that date. The correct date should have been April 16, 1974, which is the date of the filing of the opinion.

Yours very truly,

Howard K. Phillips

HOWARD K. PHILLIPS
Clerk

amc
cc: All Counsel and Interested Parties

Opinion of the United States District Court for the Northern District of Oklahoma

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA
No. 73-C-66

ORDER OF DISMISSAL

This cause was originally filed in the United States District Court for the District of Columbia and was transferred to the Northern District of Oklahoma for trial and disposition.

The plaintiff, Junior Chamber of Commerce of Rochester, Inc., New York, amended its bylaws so as to permit females to join the organization, and the individual plaintiffs are such females who did actually join the Rochester chapter.

On February 18, 1972, the defendant United States Jaycees notified Rochester Jaycees that because of the Rochester Jaycees admitting women, the United States Jaycees were suspending Rochester Jaycees from all rights, privileges and benefits accorded the Chapter, and thereafter on March 25, 1972, the administrative arm of the United States Jaycees, New York State Jaycees, Inc., formally expelled Rochester Jaycees from membership because of admission of women.

Plaintiffs seek a declaration that the

laws of the United States forbid the furnishing of financial support to the Jaycee defendants organizations which exclude females from membership and seek a permanent injunction restraining the United States Government and Secretaries of the Departments named in the Complaint as defendants from granting or continuing to grant federal support in the form of tax benefits, federal contracts and federal or governmental monetary grants and assistance, and specifically seek an Order requiring the Jaycee defendants to restore plaintiff Junior Chamber of Commerce of Rochester, Inc., to full rights and privileges as an affiliate. Plaintiffs allege and claim that specific tax exemption not enjoyed by other corporations constitutes a state action taken "under color of state law" within the meaning of the Civil Rights Act, 42 U.S.C.A. §1983; U.S.C.A. Const. Amend. 14.

It is not alleged nor claimed by the plaintiffs that discrimination of any sort, sex, color or otherwise is employed by the Jaycee organizations in the performance of their services for public or in the sponsoring of any public service projects, and it is not claimed that any of the funds granted or allowed to the Jaycees for sponsoring these specific projects is used in anywise to promote any type of discrimination.

George P. Shultz, as Secretary of the Treasury of the United States, and the six other named United States Government officials and their departments have filed Motion to Dismiss this case upon the grounds:

1. The case is, in substance, an unconsented suit against the United States, and as such, its maintenance is barred by the Doctrine of Sovereign Immunity, and

2. The Complaint fails to state a claim upon which relief may be granted.

The remaining defendants, The United States Jaycees, Tulsa, Oklahoma, and the other named defendants, moved in their Answer to Dismiss this action for failure to state a claim upon which relief may be granted.

The record clearly shows that the Jaycee defendants are all and each of them non-profitable organizations.

The national Jaycee organization and all of its official chapters located in the various cities of the United States were organized for such educational purposes and charitable purposes as will promote and foster the growth and development of young men's civic organizations in the United States, designed to inculcate in the individual membership of such organizations a spirit of genuine Americanism and civic spirit and interest, and its membership is limited to young men only.

The Court concludes that this is not a proper class action and not superior to other more appropriate and proper methods of adjudication. See Opinion of Judge A. Sherman in Christensen in Marie Wilcox, et al. v. Commerce Bank of Kansas City, a corporation, (10 C.A. Opinion filed United States Court of Appeals, Tenth Circuit, February 20, 1973).

From a study of the pleadings and the entire file in this case, there appears to be no substantial constitutional question involved. In fact, it appears that the constitutional issue alleged in the Complaint is totally lacking in substance, and, therefore, the Court concludes that this is not a proper case for statutory three-judge court consideration and treatment.

Upon due consideration of all the pleadings filed in this case, testimony, affidavits, briefs, the argument of counsel and the admitted facts, the Court is of the opinion that the Motion of George P. Shultz and the other six named government defendants to dismiss should be sustained.

It is the further judgment and opinion of the Court that the Motion to Dismiss for failure to state a claim against the remaining defendants should be sustained, and

It is the further judgment and opinion of the Court that all intervening complainants herein, who have intervened by agreement of the parties, have failed to state a claim

against the defendants and that the Intervening Complaints should be dismissed.

IT IS, THEREFORE, ORDERED that the plaintiffs' action and Intervenors' actions against the defendants and all of them should be and the same are hereby dismissed.

Dated this 26th day of June, 1973.

/s/ Luther Bohanon
UNITED STATES DISTRICT JUDGE

The New York City Jaycees, Inc. v. United States Jaycees, Inc., S.D.N.Y. No. 74 Civ. 652 (June 13, 1974). Unreported Opinion

United States District Court
Southern District of New York

THE NEW YORK CITY JAYCEES, INC., Plaintiff, -against- UNITED STATES JAYCEES, INC. and NEW YORK STATE JAYCEES, INC., Defendants.	74 Civ. 652 (MIG)

GURFEIN, D.J.:

The New York City Jaycees, Inc. ("Local") sues to enjoin the United States Jaycees, Inc. ("National") and the New York State Jaycees, Inc. ("State") from revoking the charter of the plaintiff.

The plaintiff has a charter granted by the national body. The by-laws of National provide that active membership is limited to young men between the ages of 18 and 36 of good moral character. It has been interpreted to exclude otherwise qualified female applicants.

Local had the same by-law and the same interpretation. On May 18, 1971 a proposal

was made that the by-law be amended to strike the word "men" and to substitute the word "people." This was passed by the membership on May 31, 1973.1/

In June, some women paid their dues and were admitted to the local chapter, and in August the dues were remitted to National by Local. In October, National notified Local that the dues would not be accepted without written verification that all members were male. Thereafter National took the dues but listed the women as "associates."

On October 10, 1973 the plaintiff received a notice that it was in violation of the by-laws of the defendant National which prohibited active membership for women. The plaintiff was ordered to show cause at the Executive Board of Directors meeting on February 16, 1974 why the plaintiff's charter should not be revoked. On February 11, 1974 this Court issued a temporary restraining order to prevent revocation of the charter.

A motion was made for a preliminary injunction and adjourned by consent. In the meantime, National proceeded to revoke the

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1/ Before it amended its by-laws, Local was advised by the New York Attorney General that he would construe failure to do so as a violation of N.Y. Executive Law §296.6.

charter of Local but suspended the effectiveness of the revocation pending the determination of this action.2/

The defendant National moved to quash service of the summons and complaint upon the ground that the Court lacked jurisdiction over its person. Rule 12(b)(2), Fed. R. Civ. P. Decision on this motion was reserved.

An evidentiary hearing was held on April 9, 1974 on the motion for a preliminary injunction.

I

The Facts Found

The plaintiff is incorporated in New York; the defendant National3/ in Missouri. National's headquarters are located in Tulsa, Oklahoma.4/ National began in 1915 in St. Louis as the Young Men's Progressive Civic Association. In 1920 the organization became the Junior Chamber of Commerce. In 1965 it

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2/ Ex. B to Supplemental Warfield Affd.

3/ State is not an active defendant. When defendant is mentioned without further identification, it means National.

4/ Roper Tr. 47-48.

changed its name to the United States Jaycees, Inc. Currently there are 6,500 local chapters in each of the 50 states and the District of Columbia with membership lists running approximately 325,000 in number. There are additionally international affiliates in 82 countries.5/

Local was founded in 1926 under the name Young Men's Board of Trade. In 1948 it was granted a charter by National. Its name was changed in 1965 to New York City Jaycees, Inc. Local has a membership of 114. 6/

The by-laws of National require that Local's by-laws "not contain provisions contrary to [the] by-laws [of the United States Jaycees] or the Constitution of its existing state organizations . . ." Article IV By-Law 4-2. 7/

The National structure consists of a nineteen member executive committee and the presidents of all the states and District of Columbia. This Committee has the responsibility for formulating national policy and by-laws, adopting national programs and annual budgets. There is also a paid staff at the

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5/ Zirk Affd.
6/ Warfield Tr. 14
7/ Roper Affd. 2/27/74 p. 2

national level.8/

National provides services to State organizations and local chapters.9/ Although at one time its purpose was to promote the business interests of its members, in recent years it has broadened its membership, and its program emphasis is on community services. By the defendant's statement it is involved in programs for low cost housing, prevention of child abuse, convict rehabilitation, transportation for the elderly, control of the environment and many other civic activities. The plaintiff alleges, and I so find, that membership in the Jaycees is also still linked to advancement in the business community.

National is affiliated with the United Jaycees Foundation ("the Foundation") which is governed by a self-perpetuating board of seven Trustees. The original trustees at the time of formation of the trust were three in number and they were officers of the defendant. The Board reports annually to National's Board.

The fiscal year ended July 1, 1973 was the first year National received any federal

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8/ Roper Tr. 45.
9/ Roper Tr. 49.

funds. The budget for the year ending July 1, 1974 totals $3,639,000 of which $1,143,000 or 31.4% comes from funds supplied by the Federal Government. Of that amount, $545,085 is received by National directly from the Federal Government, the remaining federal funds coming through the Foundation. $1,200,000 comes from membership dues which are transmitted by mail to National by the State chapters after they have collected them from the locals. The part of the budget not derived from federal funds and dues comes for contributions by corporations and foundations, and the sale of supplies.

The specific federal grants and contracts break down as follows:

(a) National itself is a party to two federal contracts: (1) For the control of venereal disease which was entered into with the Department of Health, Education and Welfare ("HEW") in the amount of $99,923;10/ and (2) for prevention of alcohol abuse, entered into with HEW for $445,162.11/ Of the latter amount, $140,000 is given for "seed" grants to local chapters and state organizations. In 1972-73, the New York State Chapter was awarded a seed grant of $500; and the Greater Pawling Local

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10/ Ex. D.
11/ Ex. E.

received $50.12/

(b) The Foundation is a party to three federal contracts or grants: (1) A $594,000 grant for Project Mainstream, awarded by the Office of Economic Opportunity ("O.E.O.")13/ (2) $21,500 for environmental education, funded to the extent of 19% of the total by HEW;14/ and (3) $325,363 from the Criminal Justice Program which is financed by the Manpower Administration of the Department of Labor. 15/

Project Mainstream is the largest single grant. The purpose of Project Mainstream is to develop successful self-help programs by community action agencies at the local level, 16/ dealing with economic development, community relations housing, elderly assistance, recreation and the like.17/ The New York

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12/ Ex. E to Warfield Affd. Outlining Binding.
13/ Ex. A
14/ Ex. B.
15/ Ex. C
16/ Ex. 4
17/ Project Mainstream stems from 42 USC §2769c(c) which reads: "Programs approved under this part shall, to the maximum extent feasible, contribute to the elimination of artificial barriers to employment and occupational advancements."

City part of the project is for recreation in East Harlem and federal funds are used for administrative support, rent and the provision of coaches and referees. O.E.O. made the grant conditional upon acceptance of a condition barring sex discrimination.

Of the total received by the Foundation under the Mainstream project, $152,465 goes to National, and $196,535 is paid to a consulting organization known as Together, Inc. The remaining $225,000 is earmarked for "seed" grants for local organizations. The plaintiff Local has received a grant of $4,500 under this program, one-half of which has already been paid. Project Mainstream funds are available only to Jaycee Chapters in partnership with a community action agency.18/

The Foundation has also solicited Local's involvement in another federally funded program called Project Uplift. Uplift was granted $650,000 from the O.E.O. to sponsor self-help programs.19/

Together, Inc. has its consulting arrangement with the Foundation.20/ It coordinates

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18/ Washington, member of the National Coordinating Council of Project Mainstream, Tr. 24-25.

19/ Exh. A to Warfield Affd. Outlining Funding.

20/ Ex. 5.

and supervises Project Mainstream, and renders periodic reports to the Government, National and the Foundation. 21/ Its National Advisory Council selects local Jaycee Chapters and community action agencies for awards of seed grants. 22/ Four of the sixteen members of the Council are selected by National. Four of the sixteen members represent U.S. Government Departments and Agencies. 23/

The Criminal Justice Program relates to the rehabilitation of former prisoners. The other projects are explained by their names. In addition to the earmarked community programs, National's budget is used to sponsor internal leadership programs and chapter development programs.

National is a tax-exempt organization.

National maintains no offices in New York. Its officers visit New York periodically, two or three times a year, at the Local's invitation. National has a Regional Staff Officer located in Malboro, Massachusetts, who comes to New York up to ten times a year. 24/

21/ Washington Tr. 32-36.
22/ Washington Tr. 24-25.
23/ Pl. Ex. 3.
24/ Roper Tr. at 79.

II

Jurisdiction over the Person

National has moved to quash the service of process on the ground of lack of jurisdiction over the person. Fed. R. Civ. P. 12(b)(2). Local asserts in personam jurisdiction under N.Y.C.P.L.R. §301 and under New York's long arm statute N.Y.C.P.L.R. §302, prescribed by Fed. R. Civ. P. 4(e). See Gelfand v. Tanner Motor Tours, Ltd., 339 F.2d 317 (2 Cir. 1964).

N.Y.C.P.L.R. §301. This provision preserves to New York courts "such jurisdiction over persons . . . as might have been exercised heretofore." Prior to its enactment, foreign corporations were held subject to personal jurisdiction only if they were found to be "doing business" in New York. Tauza v. Susquehanna Coal Co., 220 N.Y. 259 (1917). New York continues to adhere to the traditional "doing business" test for jurisdiction over foreign corporations when the cause of action does not arise out of acts done in New York. W. Lowenthal Co. Inc. v. Colonial Woolen Mills, Inc., 38 A.D.2d 775 (3d Dept. 1972).

The pertinent facts have already been related. Together, they constitute "doing business" in New York under existing authority.

In B.K. Bruce Lodge, Inc. v. Sub-committee of Management of the Grand Order of Odd Fellows in America, 208 App. Div. 100 (1st Dept. 1924), the Court held that a fraternal benefit corporation which "enforces its policies, decrees and orders incidental to its management, and collects dues through the instrumentality of the defendant District Grant Lodge No. 2" is "doing business within the State of New York."

Judge Botein in People v. Jewish Consumptives' Relief Society, 196 Misc. 579, 581 (Sup. Ct. N.Y. Co. 1949), reaffirmed the validity of the Bruce Lodge holding. He noted that "Numerous cases have pinpricked the areas of 'doing business' as applied to stock corporations engaged in commerce. The relatively few cases relating to nonprofit membership corporations do not delineate similar areas in such detail. But the common denominator for the 'business' of both types of corporation would seem to be the statutory definition, namely 'the activities for which the corporation shall have been organized.' And on that basis most of the norms prescribed for doing business by commercial corporations appear to apply with equal validity to nonprofit corporations." There, the Attorney General had sought to enjoin the Colorado based Relief Society from soliciting funds in New York. Judge Botein wrote, "Clearly the extensive local activities of the defendant assume the

share of doing business in this State." (Id.). National receives dues from the New York Chapter and solicits participation on projects such as Mainstream with the New York Chapter.25/ It awards "seed" subgrants for its projects to combat alcoholism for execution by the New York Chapter. It enforces its membership policies and decrees incidental to its management to insure that no women can join. And these activities have been carried on with continuity over at least the past 20 years. See Doherty v. Moreschi, 187 Misc. 175, 177 (Sup. Ct. N.Y. Co. 1946). ("The defendant International Union is engaged in business within this state. . . . Although not primarily organized for profit, the International carries on, within this state, with reasonable continuity, the activities which it was organized to perform.") To paraphrase, Frummar v. Hilton Hotels International, Inc., 19 N.Y. 2d 533, 537 (1967), the "pivotal question" is whether Local does all the business the National could do were

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25/ The officers of the National in their capacity as trustees for the Foundation have also solicited the Local's participation in Uplift.

the National here by its own officials. 26/

The motion to dismiss under Rule 12(b)(2) is denied.

III

Jurisdiction over the Subject Matter

The complaint alleges subject-matter jurisdiction under 28 U.S.C. §1343 and 42 U.S.C. §1981. It further alleges that the action arises under the Fifth and Fourteenth Amendments to the United States Constitution and bases jurisdiction on 28 U.S.C. §1331 and §1343, alleging the requisite jurisdictional amount. It also alleges jurisdiction under 42 U.S.C. §2000(d), 42 U.S.C. §1933 and under the N.Y. State Executive Law.

26/ An agency relationship, in another context, has been imputed between International and Local Unions when the Local's membership is controlled by the International. Allen v. International Alliance of Theatrical, Stage Employees and Moving Picture Machine Operators of the United States and Canada, 338 F.2d 309 (5 Cir. 1964).

Jurisdiction is sustained under 28 U.S.C. §1331, as "arising under" the Fifth Amendment, with a finding that the jurisdictional amount is properly alleged. Bell v. Hood, 327 U.S. 678 (1946).

42 U.S.C. §1981 does not apply to sex discrimination. It deals with persons who are denied rights afforded to "white citizens." See League of Academic Women v. Regents of University of California, 343 F. Supp. 636, 638 (N.D. Cal. 1972). 42 U.S.C. §2000(d) in terms bars discrimination but not on the basis of sex, see Joy v. Daniels, 479 F.2d 1236 (4 Cir. 1973).

Actions alleging sex discrimination where state action is concerned may be brought under 42 U.S.C. §1983. Brenden v. Independent School District 742, 342 F. Supp. 1224 (D. Minn. 1972), aff'd, 477 F.2d 1292 (8 Cir. 1973), but since the gravaman of the action here is against federal "governmental action" rather than "state action," jurisdiction may not be based on Section 1983. See District of Columbia v. Carter, 409 U.S. 418, 424-425 (1973).

IV

Preliminary Injunction

The defendant contends, by way of confession and avoidance, that women are allowed to become "associates," in the Jaycees; that women are involved in community action agencies which are partners in Project Mainstream; that they participate in other programs; that female beneficiaries are not discriminated against in the implementation of the grant; that there are women on the Council of Together, Inc; and so on.

No logical reason has been offered, however, why women cannot be full Jaycees members except that the male membership would like to keep it that way. Of course, if the Jaycees are a private organization which does not partake of "government action" and does not perform public functions, that may be its prerogative. 27/

27/ Subject to a possibly evolving doctrine based on tax exemption. See McGlotten v. Connally, 338 F. Supp. 443 (D.C. 1972); and see Jackson v. The Statler Foundation, ___ F.2d ___, Slip Op. No. 46, Sept. Term 1973 (2 Cir. April 5, 1974); but cf. Marker v. Shultz, 485 F.2d 1003 (D.C. Cir. 1973).

The issue is whether the Fifth Amendment applies to the internal membership policies of the Jaycees because of significant Government involvement.

The defendant maintains that there is not "significant Government involvement in the internal membership policies of the Jaycees" and that this commands dismissal of the complaint.

The plaintiff contends that the defendant is subject to constitutional limitations prohibiting discrimination and that it cannot lawfully exclude members or revoke the charters of chapters for failure to adhere to discriminatory policy solely on the basis of sex. The plaintiff relies on three factors: (1) the substantial amount of Government funds administered directly and indirectly by the Jaycees; (2) the quasi-governmental or public function of the organization; and (3) the tax-exempt status of the Jaycees.

The threshold issue is whether sex discrimination in the absence of a constitutional a amendment, may be a violation of the Fifth Amendment. The Supreme Court has decided that irrational discrimination solely on the basis of sex violates the constitutional guarantees of equal protection. Reed v. Reed, 404 U.S. 71 (1971); Frontiero v. Richardson, 411 U.S. 677 (1973). We may assume, therefore, that irrational discrimination on the basis of

sex is a violation of the Fifth Amendment if it is the result of action by the Federal Government -- "state action." 28/

The issue then is whether we can find in the decisions on what constitutes "state [government] action" a key that will solve our problem.

We know that the mere receipt of government funds is not enough to make the action of the grantee "state action." Wahba v. New York University, ____F.2d____ Slip Op. No. 353, Sept. Term 1973 (2 Cir. Feb. 11, 1974). If the State (Federal Government) is a "joint participant" in the challenged activity, that may suffice. Burton v. Wilmington Parking Authority, 365 U.S. 715, 725 (1961). But the existence of a mere regulatory scheme standing alone may not be sufficient if the actor is essentially a private organization. Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972). Yet when the state moves in to regulate the challenged activity

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28/ Though the specific action may be by the federal government rather than by a state, common usage refers to it as "state action." See McGlotten v. Connally, supra, 338 F. Supp. at 455 n. 31; Jackson v. The Statler Foundation, supra, ____ F.2d ____, Slip Op. at 2746 n. 5.

the acts of even a private organization may become "state action." Male v. Crossroads Associates, 469 F.2d 616 (2 Cir. 1972). 29/

We have latterly come to recognize that cases involving racial discrimination are more likely to be found to involve "state action" than cases involving other claims of violation of due process or First Amendment right. See e.g., Wahba, supra, Slip Op. at 1702-03; Jackson v. The Statler Foundation, supra, ____ F.2d at ____, Slip Op. at 2762. 30/

29/ Cf. Norwood v. Harrison, 413 U.S. 455, 463 (1973): "That the Constitution may compel toleration of private discrimination in some circumstances does not mean that it requires state support for such discrimination."

30/ We may conclude that this is the view of the Court of Appeals for the Second Circuit since Judges Moore and Anderson concurred with Judge Friendly in Wahba, supra, and Judges Mansfield and Oakes joined with Judge Smith in Jackson, supra. No judge of the Court has written to the contrary. Judge Mulligan expressed a similar view in Shirley v. State National Bank of Connecticut, ____ F.2d ____, Slip Op. No. 222, Sept. Term 1973 (February 14, 1974).

Whether the emphasis on racial discrimination lies in its historic context as the "prime target of the Fourteenth Amendment," see Coleman v. Wagner College, 429 F.2d 1120, 1127 (2 Cir. 1970 - Friendly, J., concurring), or whether it lies in current mores of anti-discrimination is not altogether clear, at least with any degree of unanimity. I prefer to think that the latter emphasis is at least equal to the former, if only as a sign of confidence in the ethos of this generation.

If that be arguably so, should we not gladly acknowledge that sex discrimination of an arbitrary character is as repugnant as race discrimination of a similar nature? I must concede that this approach is hardly a paradigm of logic, for the essence of state action viewed purely as an activity should hardly depend upon the character of its victims. Since we have accepted the illogic in the racial cases, however, we should accept it in the sex cases as well. We may, accordingly, think of sex as a suspect class not only in the test of what is discrimination but in the tilting of the scale in what constitutes state action.

I find that the congeries of factors here involved make the action of the United

States Jaycees in attempting to revoke the charter of the New York City Chapter "state action" and subject to the jurisdiction of the federal courts.

It is true that one cannot point to a single action of the federal government as the inducing cause of the revocation of the plaintiff's charter. But to paraphrase the language of the Supreme Court in Burton, "in its [contract with U.S. Jaycees] the [Government] could have affirmately required [the Jaycees] to discharge the responsibilities under the [Fifth] Amendment imposed upon the private enterprise as a consequence of state participation. But no State [federal government] may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them whatever the motive may be." 365 U.S. at 725.

I think here the federal government "has so far insinuated itself into a position of interdependence with [National] that it must be recognized as a joint participant in the challenged activity, which on that account, cannot be considered to have been so 'purely private' as to fall without the scope of the Fourteenth [Fifth] Amendment." Id.

"Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attribu-

ted its true significance." Burton, supra, 365 U.S. at 722.

"[T]he framework of the peculiar facts or circumstances present," 365 U.S. at 726, are:

The Jaycees have changed in recent years from an organization largely devoted to advancement of the personal interest of its members in the business world to an organization largely devoted to good deeds. The U.S. Jaycees' literature emphasizes the role of the local chapters like the plaintiff in these projects. Many of these good deeds are the kinds of activity generally thought of as public functions. A simple recitation makes that evident: control of alcohol abuse, control of venereal disease, economic development, housing and recreation and criminal rehabilitation. In all these areas the Government has admitted civic organizations to partnership in implementing goals set by Congress. The function remains essentially public. The chapters participate in that function, as the literature of National attests. 31/

31/ "Jaycess voluntary manpower and concern for his community makes this program (ex-offender rehabilitation) work." "Jaycees chapters have constructed or are in the process

The funding for these particular public activities is largely governmental. The organization which receives the funds (National or Foundation) is subject to control by an Advisory Council on which sit representatives of four departments of the National Government. " . . . even indirect governmental participation in the management of an organization is persuasive evidence of the existence of state action where that participation is both substantial and other than neutral." Jackson v. The Statler Foundation, supra, Slip Op. at 2761.

Whether the federal funds are awarded by contract or grant, the federal government can and has imposed conditions on the grantee. Thus the O.E.O. grant has a condition prohibiting sex discrimination. 32/ On the reasoning of Burton, by failing to enforce as a condition of the grant that the offending by-laws of National be nullified, the Federal Government would appear to the public to have approved discrimination based on sex in connection with the very activities

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of constructing over a quarter of a billion dollars in nonprofit housing." "Your chapter may develop . . . project ideas." "Each chapter should evaluate the needs of the young people in its community, then develop programs around those needs.

32/ Roper Tr. 65

funded in aid of the public function. "Encouragement of discrimination through the appearance of governmental approval may also be sufficient involvement to violate the Constitution." McGlotten v. Connally, supra, 333 F. Supp. at 458. 33/

The tax-exempt feature is only one other element to be considered. It is unnecessary, in view of the other elements that have led to the conclusion that "state action" is involved to rely upon the remand in Jackson v. The Statler Foundation, supra, as precedent for this decision. 34/

33/ The "s mbolic tie with the state" need not be a sheriff's badge or a public building. Powe v. Miles, 407 F.2d 73 at 83 (2 Cir. 1968). The general public knows that the government uses the Jaycees to do some of its work and that they do not permit women to become members.

34/ The defendant cites a recent opinion of the Court of Appeals of the Tenth Circuit, Junior Chamber of Commerce of Rochester, New York, et al. v. The United States Jaycees, ____F.2d____, Slip Op. No. 73-1560 in support of its position. In that case the claim was based largely on the tax-exempt status of the defendant, United States Jaycees. The plaintiffs sought injunctions

The testimony and exhibits establish the likelihood of irreparable injury to Local should the revocation be permitted to become effective. In addition to the obvious loss of prestige by loss of affiliation, it also appears likely that there will be loss of funds for Local to carry out both its internal leadership and management programs, and its community oriented programs. 35/

I find that the plaintiff has met its heavy burden of demonstrating a combination of probable success and possibility of irreparable injury. The balance of hardships also tips in its favor. Stark v. New York

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against government officials to prevent the making of grants for the use of the deprived and needy and to void the tax-exempt status of the United States Jaycees. Here the only relief sought is an injunction against the revocation of plaintiff's charter. To the extent that the opinion may be said to be a ruling on "state action," however, I note that the facts in that record are not clearly set forth. Moreover, if the record in the District Court in Oklahoma is substantially the same as that in this Court, then I must respectfully disagree with that part of the opinion.

35/ Warfield Tr. 9-12; Washington Tr. 37,40; Roper Tr. 66-67.

Stock Exchange, Inc., 466 F.2d 743, 744 (2 Cir. 1972).

The foregoing shall constitute findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 52(a).

The motion to quash is denied. The motion for a preliminary injunction is granted.

It is so ordered.

June 13, 1974

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U.S.D.J.